

STATE OF MICHIGAN
COURT OF APPEALS

ADAM T. VANDERARK,

Plaintiff-Appellee,

v

MEGAN M. VANDERARK,

Defendant-Appellant.

UNPUBLISHED

August 11, 2009

No. 291216

Kent Circuit Court

LC No. 08-010754-DM

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

Defendant, Megan M. VanderArk, appeals by leave granted an order establishing equitable parent rights in favor of plaintiff, Adam T. VanderArk to a minor child born during the parties' marriage. We reverse.

I. Facts

Adam and Megan were married in 2002, and in January 2007, Megan began an affair with David D. Hickox, the biological father of the minor child at issue in this case. Adam learned of the affair in June 2007. In October 2007, Megan informed Adam she was pregnant by another individual and at no point did she represent to Adam that he was the father of the child. After Megan moved out of the marital home in January 2008, she gave birth to Tristan T. VanderArk on March 28, 2008. Tristan is Hickox's biological son. Adam was not informed of, or present for the birth; however, three days later Megan brought Tristan to visit Adam at the marital home. Thereafter, Megan brought Tristan for approximately one visit each week from April until August 10, 2008. Adam would then visit with Tristan for about two to three hours while his mother or Megan were normally present. Adam was also Tristan's sole care provider on three occasions for a total of approximately 11 hours during the summer of 2008, but Megan refused to allow Adam to pick Tristan up from his daycare provider. She also would not facilitate Adam's participation in attending Tristan's appointments with his pediatrician, and Adam never cared for Tristan overnight. Additionally, Adam did not provide financial support or purchase necessities for Tristan. In October 2008, two months after Megan stopped contact between Adam and Tristan, Adam commenced the underlying divorce action. Thereafter, the trial court held an evidentiary hearing and ruled that Adam was the equitable parent of Tristan pursuant to the test set forth in *Atkinson v Atkinson*, 160 Mich App 601; 408 NW2d 516 (1987).

II. Equitable Parent Determination

On appeal, Megan contends that the trial court erred in finding that the first and the third prongs of the *Atkinson* test were satisfied. We agree. Whether a party has established that he is the equitable parent of a child involves a question of law this Court reviews de novo. *Killingbeck v Killingbeck*, 269 Mich App 132, 141; 711 NW2d 759 (2005); see also *Bergan v Bergan*, 226 Mich App 183, 185; 572 NW2d 272 (1997).

Pursuant to the equitable parent doctrine, a husband who is not the biological father of a child born or conceived during wedlock may be considered an equitable father with the same rights and responsibilities of a biological parent. *York v Morofsky*, 225 Mich App 333, 337; 571 NW2d 524 (1997); *Atkinson*, *supra* at 608-609. In order to be considered an equitable parent, all three of the following factors must be established:

- (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce,
- (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support. [*Atkinson*, *supra* at 608-609.]

There is no requirement that a party satisfy the *Atkinson* factors for a certain amount of time, instead, “[i]f a party satisfies these criteria for a reasonable period at some point, the party is an equitable parent with both the rights and responsibilities of any other parent.” *York*, *supra* at 337.

The first prong of the *Atkinson* test required the trial court to determine if Adam and Tristan mutually acknowledged a father-child relationship, or alternatively, whether Megan cooperated in the development of a father-child relationship over a period of time before Adam filed for divorce in October 2007. *Atkinson*, *supra* at 608-609. After concluding that Tristan was too young to acknowledge a father-child relationship, the trial court held that Megan’s actions both during her pregnancy and after Tristan’s birth facilitated a father-child relationship. We disagree. There are significant facts in this case that show Megan did not facilitate a father-child relationship between Adam and Tristan. Megan never represented to Adam that he was the father of Tristan, and shortly after Adam learned that Megan was pregnant, she moved out of the marital home. Thereafter, the parties’ primary method of communication was by text messaging and telephone; the two rarely saw each other. While Megan communicated with Adam regarding the progress of her pregnancy, she testified that she communicated with members of her family in the same manner. Moreover, Megan did not invite Adam to any of her medical appointments with her obstetrician, her pregnancy classes, or the hospital for Tristan’s birth. In fact, Megan did not even inform Adam when she went into labor, and he was unaware the child was born until three days after the fact. Following the birth, for a little over four months, Megan brought Tristan to the marital home on average one time per week where Adam would visit with Tristan for approximately two to three hours. Although Adam was Tristan’s sole care provider on three occasions, these visits were brief and isolated. Two of the occasions lasted approximately three hours each, and the other occasion lasted approximately five hours. In sum,

the record shows that Adam was Tristan's sole care provider for a total of approximately 11 hours of the child's first four months of life. As the summer progressed, Megan brought Tristan for fewer visits, and she made excuses to keep Adam from visiting with the child. Additionally, Megan never allowed Adam to provide overnight care for Tristan, Adam never lived with Tristan, Megan did not facilitate Adam's participation in Tristan's medical appointments, and Adam did not provide any financial or material support for Tristan until April 2009, more than six months after the divorce proceedings began. Furthermore, Megan would not allow Adam to pick Tristan up from daycare, and she even threatened to call police if he appeared at Tristan's daycare center. In addition, there is no evidence that Megan informed Adam that he would be Tristan's father figure, and by August 2008 Megan cut off all contact between Adam and Tristan. Following Megan's termination of the visitations, Adam did not take any legal action for almost two months. The trial court even noted in its opinion and order that the facts showed Megan frustrated the development of a relationship between Adam and Tristan for over half of Tristan's life. On this record, we conclude that the trial court erred in finding that the first prong of *Atkinson* was satisfied and in ultimately concluding that Adam is the equitable parent of Tristan. Therefore, we need not review the trial court's application of the third prong of *Atkinson*.

Megan also contends that the trial court erred in applying a preponderance of the evidence burden of proof in this case, however, she failed to preserve this issue for our review and in light of our resolution of the first issue, she cannot show plain error affecting substantial rights. *First Nat'l Bank v Dep't of Treasury*, 280 Mich App 571, 589; 760 NW2d 775 (2008). We therefore reserve resolution of this issue for another day.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher